No. 17-71636

United States Court of Appeals for the Ninth Circuit

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*

Petitioners,

STATE OF NEW YORK, *et al.*

Intervenors,

v.

ANDREW WHEELER, ACTING ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Respondents.

On Petition for Review of an Order of the U.S. Environmental Protection Agency

MOTION OF DOW AGROSCIENCES LLC FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION FOR *EN BANC* AND PANEL REHEARING FILED BY RESPONDENT

Stanley H. Abramson
Donald C. McLean
ARENT FOX LLP
1717 K Street, N.W.
Washington, DC 20006
(202) 857-6000
stanley.abramson@arentfox.com
donald.mclean@arentfox.com

Christopher Landau, P.C.
Archith Ramkumar
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 Eye Street, N.W. Suite 900
Washington, DC 20005
(202) 538-8000
chrislandau@quinnemanuel.com
archithramkumar@quinnemanuel.com

Counsel for Amicus Curiae Dow AgroSciences LLC

October 4, 2018

Pursuant to Federal Rule of Appellate Procedure 29 and Circuit Rule 29-2, Dow Agrosciences LLC (Dow) respectfully moves for leave to submit the attached *amicus curiae* brief in support of the petition for *en banc* and panel rehearing filed by Respondent U.S. Environmental Protection Agency ("EPA"). *See* Dkt. 115. In support of this motion, Dow states as follows:

1. Dow is the primary registrant for chlorpyrifos, and thus has a legally cognizable property interest in chlorpyrifos registrations. *See, e.g., Center for Biological Diversity v. EPA*, No. 11-cv-00293-JCS, 2013 WL 1729573, at *7 (N.D. Cal. Apr. 22, 2013); *Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 36 (D.D.C. 2011). Dow spent many years developing the product, which is of the nation's most widely used pesticides.

2. Dow thus has a direct and concrete interest in the outcome of this appeal. Accordingly, Dow filed an unopposed motion to participate as *amicus curiae* at the merits stage. *See* Dkt. 72-1. This Court granted the motion, *see* Dkt. 97, and accepted Dow's *amicus* brief, *see* Dkt. 72-2.

3. A divided merits panel [1] exercised jurisdiction over this appeal, [2] vacated EPA's order denying a petition to revoke chlorpyrifos tolerances, and [3] ordered EPA to "revoke all tolerances and cancel all registrations for chlorpyrifos within 60 days." Slip op. 32. That decision, if left undisturbed, will nullify Dow's property interest in chlorpyrifos registrations.

4. Dow's submission of an *amicus* brief in support of EPA's petition for *en banc* and panel rehearing will materially assist this Court's decisional process because of Dow's unique perspective as the owner of the licenses granted by the chlorpyrifos registrations. Although EPA has a regulatory interest in defending its registration decisions, that interest is distinct from Dow's proprietary interest in protecting its registrations and defending its product. *See, e.g.*, *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001) ("The priorities of the defending government agencies are not simply to confirm the [private parties'] interests .... The interests of government and the private sector may diverge."). Indeed, this Court recognized this distinct perspective by granting Dow's motion to file an *amicus* brief at the merits stage. *See* Dkt. 97.

5. This Court has not hesitated to allow the participation of *amici* in support of a petition for rehearing or rehearing *en banc* where, as here, such participation allows consideration of different consequences and perspectives regarding the effect of a panel ruling. *See, e.g.*, *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 852 n.3 (9th Cir. 2018) ("In connection with en banc proceedings, we received ... amicus briefs from a broad array of interested parties .... The briefs were helpful to our understanding of the implications of this case from various points of view. We thank amici for their participation."); *see also Newton v. Parker Drilling Mgmt. Servs., Ltd.*, No. 15-56352, Dkt. 52 (9th Cir. Apr. 27, 2018) (granting motion for leave to file brief as amicus curiae in support of petition for rehearing en banc). Similarly, the attached proposed brief will allow this Court to consider the implications of the ruling from Dow's point of view.

6. If anything, Dow's motion to file a *amicus* brief in this case in support of EPA's petition for *en banc* and panel rehearing is a modest one, as this Court routinely allows private parties with property interests in the subject matter of the litigation not merely to file such a brief, but to intervene in the litigation. *See, e.g.*, *Center for Biological*

Diversity v. EPA, 847 F.3d 1075, 1081 n.3 (9th Cir. 2017); *Pollinator Stewardship Council v. EPA*, 806 F.3d 520, 523 (9th Cir. 2015); *NRDC v. EPA*, 735 F.3d 873, 875 (9th Cir. 2013).

7. Pursuant to Circuit Rule 29-3, Dow contacted all parties regarding their position on this motion. Petitioners League of United Latin American Citizens *et al.* responded as follows: "We do not consent. Please represent that if the motion is granted, we would like 5 more pages and ask that all amici coordinate and avoid duplication." Intervenor states New York, Massachusetts, Washington, California, Hawaii, Maryland, and Vermont, and the District of Columbia stated that they "take[] no position" on the motion, "without prejudice to any application for leave to file a response after having read [the] submission." Respondent EPA stated that it EPA "does not oppose the proposed filing."

For the foregoing reasons, Dow respectfully requests that the Court grant this motion to permit the filing of the accompanying *amicus* brief in support of EPA's petition for *en banc* and panel rehearing.

October 4, 2018

Respectfully submitted,

/s/ Christopher Landau

Stanley H. Abramson
Donald C. McLean
ARENT FOX LLP
1717 K Street, N.W.
Washington, DC 20006
(202) 857-6000
stanley.abramson@arentfox.com
donald.mclean@arentfox.com

Christopher Landau, P.C.
Archith Ramkumar
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
1300 Eye Street, N.W. Suite 900
Washington, DC 20005
(202) 538-8000
chrislandau@quinnemanuel.com
archithramkumar@quinnemanuel.com

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I served the foregoing Motion Of Dow AgroSciences LLC For Leave To File *Amicus Curiae* Brief In Support Of Petition For *En Banc* And Panel Rehearing Filed By Respondent on all parties via this Court's CM/ECF system by electronically filing the motion.

/s/ Christopher Landau
Christopher Landau, P.C.

Counsel for Amicus Curiae
Dow AgroSciences LLC

No. 17-71636

United States Court of Appeals for the Ninth Circuit

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*

Petitioners,

STATE OF NEW YORK, *et al.*

Intervenors,

v.

ANDREW WHEELER, ACTING ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*

Respondents.

On Petition for Review of an Order of the U.S. Environmental Protection Agency

BRIEF OF *AMICUS CURIAE* DOW AGROSCIENCES LLC IN SUPPORT OF RESPONDENTS' PETITION FOR *EN BANC* AND PANEL REHEARING

Stanley H. Abramson
Donald C. McLean
ARENT FOX LLP
1717 K Street, N.W.
Washington, DC 20006
(202) 857-6000
stanley.abramson@arentfox.com
donald.mclean@arentfox.com

Christopher Landau, P.C.
Archith Ramkumar
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 Eye Street, N.W. Suite 900
Washington, DC 20005
(202) 538-8000
chrislandau@quinnemanuel.com
archithramkumar@quinnemanuel.com

Counsel for Amicus Curiae Dow AgroSciences LLC

October 4, 2018

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amicus curiae* Dow AgroSciences LLC hereby certifies that it is an indirect wholly owned subsidiary of DowDuPont, Inc. No other corporation owns 10% or more of the stock of Dow AgroSciences LLC.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes and Rules

Other Authorities

INTRODUCTION[1]

The divided panel in this case made no effort to hide its frustration at EPA's delay in addressing petitioners' challenges to chlorpyrifos, one of the nation's most widely used pesticides. As the panel majority declared, "[i]f Congress's statutory mandates are to mean anything, the time has come to put a stop to this patent evasion." Slip op. 7. Accordingly, the majority not only (1) asserted jurisdiction over the petition and vacated the challenged agency order, but also (2) instructed the agency what outcome to reach on remand.

But frustration is not a basis for sound judicial decisionmaking—especially where, as here, the panel's decision adversely affects not only (indeed, not even primarily) EPA, but also the non-party owners of registrations for chlorpyrifos products (like *amicus* Dow AgroSciences) and the non-party farmers and others who use those products. These non-parties are not responsible for EPA's delay, yet now bear the brunt of the panel's epic smackdown of the agency. Contrary to the panel's

---

[1] This brief was not authored in whole or in part by any party's counsel, and no party, party's counsel, or other person contributed money intended to fund the preparation or submission of the brief. *See* Fed. R. App. P. 29(a)(4)(E).

assertion, "[i]f Congress's statutory mandates are to mean anything," *id.*, courts must firmly and faithfully enforce those mandates—no more and no less. And *that* the panel manifestly failed to do, with respect to both jurisdiction and remedy.

With respect to jurisdiction, the beginning and the end of the matter is that an initial EPA order denying a petition filed under 21 U.S.C. § 346a(d), like the one here, is not final agency action subject to judicial review. As Judge Fernandez noted in his dissent, the statute's plain language makes the denial of a § 346a**(d)** petition a precursor to "[f]urther proceedings" before the agency under § 346a**(g)**. Only when the agency issues a "[f]inal decision" denying a petition under § 346a(g) is the statute's "[j]udicial review" provision triggered. Indeed, the statute expressly *precludes* "judicial review" of an initial order entered under § 346a(d) where, as here, a party can file or has filed objections to that order with the agency under § 346a(g). *See* 21 U.S.C. § 346a(h)(5). "If Congress's statutory mandates are to mean anything," Slip op. 7, a court has no jurisdiction to review a non-final agency decision as to which Congress has expressly precluded judicial review.

With respect to remedy, the panel decision is—if anything—even more far-fetched. The panel majority not only vacated EPA's order denying the § 346a(d) petition, but ordered the agency to revoke all chlorpyrifos tolerances under the Federal Food, Drug, and Cosmetic Act (FFDCA) and cancel all chlorpyrifos registrations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) within 60 days. *See* Slip op. 30-32. By ordering such affirmative relief, the panel majority usurped the agency's role. It is Administrative Law 101 that, absent an unambiguous statutory directive, a reviewing court's role is *negative*, not *affirmative*, in nature: the court may "hold unlawful and set aside agency action," 5 U.S.C. § 706(2), but may not dictate the agency's future action. Here, the panel seized on the agency's preliminary and non-binding risk assessments to instruct the agency what final conclusion to reach on the merits. And, to make matters worse, the panel effectively ordered EPA to violate the law; under FIFRA's reticulated remedial scheme, the agency cannot lawfully cancel all chlorpyrifos registrations within 60 days. "If Congress's statutory mandates are to mean anything," Slip op. 7, a court cannot substitute its own judgment for an agency's.

In short, frustration with EPA does not provide a license to ignore the law. By asserting jurisdiction over the petition, and then directing the outcome on remand, the panel majority did just that, and thereby created a welter of conflicts with prior decisions of the Supreme Court, this Court, and other Circuits. Accordingly, rehearing is warranted.

ARGUMENT

I. The Panel Decision Defies The Statute And Conflicts With Binding Precedent On Jurisdiction.

The panel erred, as a threshold matter, by dismissing the judicial review provision at issue here, 21 U.S.C. § 346a(h), as a mere "claim processing" rule rather than a limitation on this Court's subject-matter jurisdiction. *See* Slip op. 15-25. Even a "claim processing" rule requires a "claim" to be "processed." Here, petitioners have no "claim" unless and until EPA resolves their pending § 346a(g) petition.

This is not a complicated statutory issue. As relevant here, the FFDCA authorizes "any person" to file a petition with EPA "proposing the issuance of a regulation ... revoking a tolerance for a pesticide chemical residue in or on a food." 21 U.S.C. § 346a(d)(1)(A). Petitioners filed a petition to revoke all tolerances for chlorpyrifos in 2007, and—after this Court granted mandamus to compel agency action, *see In re*

Pesticide Action Network N. Am., 798 F.3d 809, 813-15 (9th Cir. 2015)—EPA ultimately entered an order denying that petition under § 346a(d)(4) on March 29, 2017.

The problem for petitioners is that an order denying a petition under § 346a(d) is not final agency action subject to judicial review. Rather, "[w]ithin 60 days after a regulation or order is issued under subsection (d)(4), ... any person may file objections with the Administrator, specifying with particularity the provisions of the regulation or order deemed objectionable and stating reasonable grounds therefor." 21 U.S.C. § 346a(g)(2)(A). If a person does indeed file such objections, EPA must, "[a]s soon as practicable," "issue an order stating the action taken upon each such objection." *Id.* § 346a(g)(2)(C).

The key point here is that, under the statute's "[j]udicial review" provision, 21 U.S.C. § 346a(h), *only* a "[f]inal decision" under § 346a(g)—*not* a preliminary order under § 346a(d)—is subject to judicial review. *See* 21 U.S.C. § 346a(h)(1) ("In a case of actual controversy as to the validity of ... any order issued under subsection (g)(2)(C) ... any person who will be adversely affected by such order ...

may obtain judicial review by filing in the United States Court of Appeals for the circuit wherein that person resides or has its principal place of business."). And, lest there be any doubt that this provision establishes the *exclusive* mechanism for judicial review of an order refusing to revoke a tolerance, it specifies that "[a]ny issue as to which review is or was obtainable under this subsection *shall not be the subject of judicial review under any other provision of law*." 21 U.S.C. § 346a(h)(5) (emphasis added).

Notwithstanding this clear limitation on judicial review, the panel majority concluded that the statute does not "'clearly state[]'" that "obtaining a (g)(2)(C) order in response to administrative objections is a jurisdictional requirement." Slip op. 17 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)). That is so, the majority declared, because the provision "is written as a restriction on the rights of plaintiffs to bring suit, rather than as a limitation on the power of the federal courts to hear the suit," and "delineates the process for a party to obtain judicial review, ... not the adjudicatory capacity of th[e] courts." *Id.* at 17-18 (internal quotation omitted). In particular, the

majority emphasized, "[t]he word 'jurisdiction' never appears." *Id.* at 18.

That conclusion defies the basic judicial duty "to make sense rather than nonsense out of the *corpus juris*." *Maslenjak v. United States*, 137 S. Ct. 1918, 1926 (2017) (internal quotation omitted). As Judge Fernandez explained in dissent, there is no way to understand § 346a(h) as anything *other* than a jurisdictional provision. *See* Slip op. 36-37 (dissenting opinion). Indeed, it is the only provision of the FFDCA to authorize judicial review of an EPA order refusing to revoke a tolerance. Thus, insofar as § 346a(h) precludes judicial review of a particular order refusing to revoke a tolerance, it follows that this Court lacks jurisdiction to review any such order. The general rule, after all, is that judicial review begins in the district courts, not the courts of appeals, unless a statute specifies otherwise. *See, e.g.*, *NRDC v. Johnson*, 461 F.3d 164, 172 (2d Cir. 2006) (quoting *Cutler v. Hayes*, 818 F.2d 879, 888 n.61 (D.C. Cir. 1987)); *cf. Utah v. EPA*, 765 F.3d 1257, 1260 (10th Cir. 2014). If the "[j]udicial review" provision of § 346a(h) does not apply, there is no basis for this Court to exercise jurisdiction over this case at all. The panel majority certainly identified no *other*

statutory provision giving this Court jurisdiction to review an order refusing to revoke a tolerance.[2]

In addition, the majority's approach effectively nullifies the administrative review process established by § 346a(g). The majority made no attempt to explain the point of that process if a petitioner could proceed straight to court to challenge a non-final order denying a petition under § 346a(d). Judicial review of matters still pending before the agency would invariably encroach on the agency's process. This case proves the point: the majority mooted EPA's pending § 346a(g) proceeding by exercising jurisdiction over the agency's non-final order denying the § 346a(d) petition, and directing the agency to revoke all chlorpyrifos tolerances under the FFDCA and cancel all chlorpyrifos registrations under FIFRA within 60 days. "In light of [the statute's]

---

[2] And, as Judge Fernandez pointed out in dissent, no such other statutory provision exists. FIFRA's judicial review provisions do not provide an end-run around the FFDCA's judicial review provisions where, as here, petitioners "'challenge the registration of pesticides under FIFRA only through their challenge to the tolerances set under the FFDCA.'" Slip op. 39 (dissenting opinion; quoting *Johnson*, 461 F.3d at 176). The judicial review provisions of the Administrative Procedure Act are similarly unavailing, because they channel review to the district courts, not the courts of appeals, in the first instance. *See id.* at 40 n.12 (citing 5 U.S.C. §§ 704, 706).

careful restriction on judicial review, it is not at all likely that Congress would have authorized our seizing jurisdiction before the specific agency action was concluded." Slip op. 36-37 (Fernandez, J., dissenting); *see also id.* ("Had Congress contemplated appellate court review before the EPA completed the process required by § 346a(g)(2)(C), it could easily have inserted orders under § 346a(d)(4) ... into the judicial review provisions of § 346a(h)(1), which, of course, it did not do.").

The majority's focus on the word "jurisdiction," Slip op. 18, is similarly unavailing. As the very case cited by the majority explains, that word is not talismanic: "Congress [need not] incant magic words in order to speak clearly. We consider 'context ... as probative of whether Congress intended a particular provision to rank as jurisdictional.'" *Sebelius*, 568 U.S. at 153-54 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010)); *see also Utah*, 765 F.3d at 1258 ("To make its intention 'clear' ... Congress need not use any particular words.") (quoting *Sebelius*, 568 U.S. at 153). In any event, contrary to the panel's assertion, the statute's "[j]udicial review" provision, § 346a(h), *does* use the word "jurisdiction." Indeed, § 346a(h)(2) is entitled "Record *and jurisdiction*," and provides in relevant part that, upon the filing of a

petition for review from an order entered under § 346a(g)(2)(C), "the court shall have exclusive *jurisdiction* to affirm or set aside the order … complained of in whole or in part." 21 U.S.C. § 346a(h)(2) (emphasis added). In "context," then, it is clear that these statutory provisions governing the availability of judicial review address the courts' jurisdiction to entertain a petition challenging an order denying revocation of a tolerance. *Sebelius*, 568 U.S. at 153 (internal quotation omitted).

In addition, the fact that the statute's judicial review provision uses the permissive term "may" rather than the mandatory term "shall," *see* Slip op. 19, proves nothing. That provision uses "may" for the simple reason that an aggrieved person is not *required* to seek judicial review of final agency action. But that does not mean that an aggrieved person may obtain judicial review of non-final agency action. To the contrary, only a revocation decision entered under § 346a(g) is subject to judicial review. Were § 346a(h)(1) to leave any doubt on this score, § 346a(h)(5) removes it by specifying that "[a]ny issue as to which review is or was obtainable under this subsection," which includes orders refusing to revoke a tolerance under § 346a(g), "*shall not be the*

subject of judicial review under any other provision of law." 21 U.S.C. § 346a(h)(5) (emphasis added).

None of this is novel; indeed, this Court already reached the same conclusion in *Nader v. EPA*, 859 F.2d 747, 753-54 (9th Cir. 1988), and in the mandamus panel's decision denying petitioners' final request for relief, *see In re Pesticide Action Network N. Am.*, 863 F.3d 1131, 1132-33 (9th Cir. 2017); *see also* Dow AgroSciences Merits *Amicus* Br. [Dkt. 72-2], at 11-12. Similarly, in *Johnson*, the Second Circuit explained that an order denying a petition under § 346a(d)(4) is not judicially reviewable. *See* 461 F.3d at 173. Unsurprisingly, Judge Fernandez relied heavily upon *Johnson* to conclude that this Court lacks jurisdiction over the petition. *See* Slip op. 35-36 (dissenting opinion).

Ultimately, the panel majority sought to justify its decision by raising the specter that EPA might unduly delay the resolution of petitioners' objections under § 346a(g), just as the agency delayed the resolution of petitioners' objections under § 346a(d). *See* Slip op. 21-23. According to the majority, "[t]he history of this very case vividly illustrates this danger." *Id.* at 22. But the history of this case illustrates just the opposite: the statute directs EPA to respond to

§ 346a(g) objections "[a]s soon as practicable," § 346a(g)(2)(C), and were the agency unduly to delay its response, petitioners could (and surely would) once again seek mandamus relief, which "[t]he history of this very case," Slip op. 22, shows this Court is prepared to grant. In any event, speculation about the possibility of future delay does not allow a court magically to transform a non-reviewable preliminary decision into a reviewable final one.

The irony here is that, if any panel of this Court is familiar with EPA's delay in resolving the § 346a(d) petition, it is the panel that granted mandamus relief directing EPA to decide that petition by a date certain. Indeed, that panel (comprised of Judges O'Scannlain, Tashima, and McKeown), issued no fewer than *five* published decisions in that matter. *See In re Pesticide Action Network N. Am.*, [1] 790 F.3d 875 (9th Cir. 2015), [2] 798 F.3d 809 (9th Cir. 2015), [3] 808 F.3d 402 (9th Cir. 2015), [4] 840 F.3d 1014 (9th Cir. 2016), [5] 863 F.3d 1131 (9th Cir. 2017). But that panel recognized that frustration with the agency does not provide a license to ignore the law. Thus, when petitioners returned to the mandamus panel for relief after EPA denied their § 346a(d) petition on March 29, 2017, that panel held that the request

came "too soon." 863 F.3d at 1132. In particular, the mandamus panel explained that "substantive objections [to EPA's March 29, 2017 order] *must first be made through the administrative process mandated by statute*." *Id.* (emphasis added; citing 21 U.S.C. §§ 346a(g)(2) & (h)(1)). Indeed, the panel noted, petitioners "implicitly recognize[d] as much by acknowledging that 'filing objections and awaiting their resolution by the EPA Administrator is a *prerequisite* to obtaining judicial review' of EPA's final response to the petition. *Only at that point may we consider the merits of EPA's final agency action.*" *Id.* at 1133 (emphasis added; internal quotation omitted).

By exercising jurisdiction over this case in the absence of "final agency action," *id.*, the panel majority here blasted a gaping hole in a comprehensive statutory scheme and departed from binding precedent. Accordingly, rehearing on this ground is warranted.

II. The Panel Decision Orders Unlawful Action And Conflicts With Binding Precedent On Remedy.

The panel majority exacerbated its error of asserting jurisdiction over this case by not only vacating EPA's order denying the petition under § 346a(d), but also directing the agency to revoke all chlorpyrifos tolerances under the FFDCA and cancel all chlorpyrifos registrations

under FIFRA within 60 days. *See* Slip op. 30-32. The FFDCA's judicial review provision gives a reviewing court a choice of just two remedies: "[1] affirm or [2] set aside the order or regulation complained of in whole or in part." 21 U.S.C. § 346a(h)(2). Instead of selecting one of these two options, the panel concocted a third option of directing EPA to reach a particular outcome on remand. That directive is fraught with problems, not the least of which is that the panel effectively ordered EPA to violate federal law.

As a threshold matter, the affirmative remedy ordered here conflicts with not only the statute's plain language but also bedrock principles of administrative law. "A court of appeals is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (*per curiam*; internal quotation omitted). Instead, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Id.* (internal quotation omitted). This foundational principle of administrative law is known as the "ordinary remand rule." *Id.* at 187 (internal quotation omitted); *see also Negusie v. Holder*, 555 U.S. 511,

523 (2009) (invoking the "ordinary remand rule"); *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 US. 644, 657-58 (2007) (after setting aside agency action, reviewing court not entitled to "jump[] ahead and resolve the merits of the dispute" in the first instance); *INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("[A] judicial judgment cannot be made to do service for an administrative judgment.") (internal quotation omitted); *Barroso v. Gonzales*, 429 F.3d 1195, 1209 (9th Cir. 2005) (same).

The panel majority here, however, decided that the record "mandates revoking the tolerance under § 346a(b)(2)(A)(i)." Slip op. 31. The court identified no source of authority for that decision, which "intrude[s] upon the domain which Congress has exclusively entrusted to an administrative agency." *Orlando Ventura*, 537 U.S. at 16 (internal quotation omitted; alteration in original). An administrative agency is entitled to "bring its expertise to bear upon the matter" by "evaluat[ing] the evidence" in the first instance; "through informed discussion and analysis, [this can] help a court later determine whether its decision exceeds the leeway that the law provides." *Id.* at 17; *see also Nader*, 859 F.2d at 754 ("By ignoring the statute's prescribed

procedures and appealing directly to this court, petitioners bypassed the important intermediate step of objecting and requesting a hearing before the Agency .... [T]he lack of a hearing and fully developed record deprives this court of the full benefit of the Agency's expertise."). Courts are generally in the business of *reviewing* agency action, not *directing* agency action in the first instance.

Thus, even assuming that this Court had jurisdiction over this case, the most it lawfully could do is set aside EPA's order denying the § 346a(d) petition; it has no legal or factual basis for directing the agency to revoke all chlorpyrifos tolerances under the FFDCA and cancel all chlorpyrifos registrations under FIFRA within 60 days. The panel majority concluded otherwise by declaring that "[t]he EPA presents no arguments in defense of its decision," and thus "has forfeited any merits-based argument." Slip op. 30-31. But that is a *non sequitur*: the agency's decision to rest on its jurisdictional arguments does not expand the Court's remedial authority.

The panel majority noted that "[t]he FFDCA states unequivocally that the Administrator 'shall modify or revoke a tolerance if *the Administrator determines it is not safe.*'" Slip op. 31 (emphasis added;

quoting 21 U.S.C. § 346a(b)(2)(A)(i)). But the Administrator has made no such determination; to the contrary, the Administrator made a final determination in 2006 that the tolerances at issue here *are* safe. *See* U.S. Environmental Protection Agency Office of Pesticide Programs, *Reregistration Eligibility Decision for Chlorpyrifos* (July 31, 2006), at 1-2, *available at* https://tinyurl.com/y97ng58n ("EPA has concluded, after completing its assessment of the cumulative risk associated with exposures to all of the [organophosphates], that ... the pesticide tolerances [for chlorpyrifos] ... meet the [FFDCA] safety standard ...."). That 2006 final safety determination remains in full force to this day. The panel majority thus erred by characterizing "[t]he EPA's 2016 risk assessment" as "the EPA's *final safety determination* before the 2017 EPA Order." Slip op. 31 (emphasis added). A "risk assessment" is not the same thing as a "final safety determination"; rather, a risk assessment is merely a tool the agency uses in making such a determination. The 2016 risk assessment did not disturb the 2006 final safety determination, and was not binding on the agency in any way. *See, e.g.*, *Home Builders*, 551 U.S. at 659 (noting that agencies are

entitled to reverse their own preliminary conclusions, and that doing so "does not render the decisionmaking process arbitrary and capricious.").

Indeed, far from being a final safety determination, the 2016 risk assessment led EPA to reopen the public comment period on an agency *proposal* to revoke all chlorpyrifos tolerances. *See* EPA, *Chlorpyrifos; Tolerance Revocations; Notice of Data Availability & Request for Comment*, 81 Fed. Reg. 81049, 81049-50 (Nov. 17, 2016). In response to that proposal, EPA received numerous comments revealing "considerable areas of uncertainty with regard to what the epidemiology data show and deep disagreement over how those data should be considered in EPA's risk assessment." EPA, *Chlorpyrifos; Order Denying PANNA & NRDC's Petition To Revoke Tolerances*, 82 Fed. Reg. 16581, 16590 (Apr. 5, 2017). "Following a review of [those] comments," EPA ultimately "concluded that, despite several years of study, the science addressing neurodevelopmental effects remains unresolved and that further evaluation of the science … is warranted …." *Id.* at 16583.

Thus, notwithstanding the panel majority's remarkable assertion that "[o]ver nearly two decades, [EPA] has documented the *likely adverse effects* of foods containing the residue of the pesticide

chlorpyrifos on the physical and mental development of American infants and children," Slip op. 7 (emphasis added), the agency has never reached any such conclusion; to the contrary, as noted above, the 2006 final safety determination remains in effect. And, contrary to the majority's assertion that there is "no reason" for the agency to "act[] against its own science findings," *id.* at 31 (internal quotation omitted), EPA's own Scientific Advisory Panel cast substantial doubt on the Columbia study on which EPA primarily based its previous proposal to revoke all chlorpyrifos tolerances—pointing out, among other things, that the study did not purport to establish causation, *see* ER1195; *see generally* Dow AgroSciences Merits *Amicus* Br. [Dkt. 72-2], at 19-28.

Making matters worse, after determining that the 2016 risk assessment mandated revocation of all tolerances for chlorpyrifos under the FFDCA, the panel majority asserted that "[c]hlorpyrifos similarly does not meet the statutory requirement for registration under FIFRA, which incorporates the FFDCA's safety standard." Slip op. 32. But FIFRA "incorporates the FFDCA's safety standard" only with respect to "a human dietary risk from residues that result from a use of a pesticide in or on any *food* inconsistent with the standard under [the FFDCA]." 7

U.S.C. § 136(bb) (emphasis added). With respect to all other uses, the FIFRA registration standard does *not* track the FFDCA, and the panel majority thus had no basis for ordering the cancellation of all chlorpyrifos registrations under FIFRA across the board within 60 days. This point underscores the danger of judicial overreaching by not merely setting aside challenged agency action but affirmatively directing the agency's course on remand.

In addition, even with respect to *food* uses of chlorpyrifos, the panel effectively ordered EPA to violate the law by directing the agency to revoke all chlorpyrifos registrations under FIFRA within 60 days. Once a pesticide registration is granted, it becomes the registrant's property interest, *see, e.g.*, *Reckitt Benckiser Inc. v. EPA*, 613 F.3d 1131, 1133 (D.C. Cir. 2010), and cannot "be taken away without that procedural due process required by the Fourteenth Amendment," *Bell v. Burson*, 402 U.S. 535, 539 (1971). FIFRA protects these due process rights by establishing an elaborate scheme for EPA to follow before cancelling a pesticide registration. *See, e.g.*, 7 U.S.C. §§ 136d(b)(1),(2); 136d(d); 136a(g)(1)(v); *see generally Center for Biological Diversity v. EPA*, 847 F.3d 1075, 1085 (9th Cir. 2017) ("FIFRA establishes

comprehensive procedures for the EPA's ... cancellation of registration of pesticide[s]."). Given the statute's specific notice periods, EPA cannot lawfully comply with the majority's directive to "cancel all registrations for chlorpyrifos within 60 days." Slip op. 32. *Amicus* is aware of no other case in the annals of American law where a court has ordered an agency to violate the law. Again, this point only underscores why the proper judicial role is limited to setting aside challenged agency action, and does not extend to affirmatively directing the agency's course on remand.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for panel rehearing or rehearing *en banc*.

October 4, 2018

Respectfully submitted,

/s/ Christopher Landau

Stanley H. Abramson
Donald C. McLean
ARENT FOX LLP
1717 K Street, N.W.
Washington, DC 20006
(202) 857-6000
stanley.abramson@arentfox.com
donald.mclean@arentfox.com

Christopher Landau, P.C.
Archith Ramkumar
QUINN EMANUEL URQUHART
& SULLIVAN, LLP
1300 Eye Street, N.W. Suite 900
Washington, DC 20005
(202) 538-8000
chrislandau@quinnemanuel.com
archithramkumar@quinnemanuel.com

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief is 4,159 words long, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Christopher Landau
Christopher Landau, P.C.

Counsel for Amicus Curiae
Dow AgroSciences LLC

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2018, I served the foregoing Brief of *Amicus Curiae* Dow AgroSciences LLC in Support of Respondents' Petition for *En Banc* And Panel Rehearing on all parties via this Court's CM/ECF system by electronically filing the brief.

/s/ Christopher Landau
Christopher Landau, P.C.

Counsel for Amicus Curiae
Dow AgroSciences LLC